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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 784

FRANCIS RAY ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 366 F. 2d 575.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1966. Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including November 19, 1966, and on November 18, 1966, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law.

2. Whether the trial court's instructions as to entrapment were erroneous.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on four counts (Counts 1–4) of an indictment charging the dispensing of habit-forming drugs without a prescription in violation of the Federal Food, Drug, and Cosmetic Act (See 21 U.S.C. 331(k), 353(b)(1)) and on three counts (Counts 5–7) charging the sale and purchase of narcotic drugs in violation of 26 U.S.C. 4704(a), 4705(a). He was sentenced to imprisonment for one year on each of the first four counts, and fifteen years on Counts 5 and 7, the terms to run concurrently. Sentence on Count 6 was suspended, and probation for five years was imposed. On appeal the conviction was affirmed.

The government's evidence showed that, in September 1964, Federal Food and Drug Inspector Roberts, who was investigating in an undercover capacity the sale of amphetamine at a Dallas, Texas, truck stop, was referred to petitioner. On October 2, petitioner called from his home in Tulsa, Oklahoma, to the agent in Waco and arranged for an early morning meeting at the Dallas truck stop. At this time he sold the agent a quantity of amphetamine tablets and expressed a desire to "take care" of him in the future (R. 16–25).

Thereafter, frequent telephonic communications took place between Inspector Roberts and petitioner, and they culminated in another meeting at the Dallas truck stop on October 17. At that time Roberts, with petitioner's consent, brought along Food and Drug Inspector Beacham, who was represented to be another drug peddler (R. 26–27). At this meeting both inspectors purchased non-narcotic drugs and discussed with petitioner prices and the availability of additional supplies (R. 27–29; 159–163). Petitioner said that he could get "anything" because his brother was a doctor (R. 160). Thereupon Beacham asked if petitioner could get "hard stuff". Petitioner replied that he had recently obtained 25 morphine tablets for an individual who "later on was found out to be an addict" and that his brother would not thereafter permit him to sell to that individual (R. 28). Beacham observed that good money could be made by dispensing morphine tablets in the Waco area, and petitioner replied that he "would check with his man and see what could be done" (R. 28).

In a subsequent telephone conversation on October 28, Inspector Roberts asked if petitioner had morphine tablets. Petitioner answered that he had access to them and that the price would approximate fifty cents per tablet (R. 31).

Following telephone calls by petitioner and Roberts on November 11, the two inspectors drove to Tulsa, where petitioner met them and drove them in his own car to his trailer house. There he pro-

duced many habit-forming drugs (such as tuinal, seconal, amphetamine powder and liquid) and repeatedly urged the inspectors to sample or buy them. The inspectors' purchases on that occasion formed the basis for the charges in Counts 1–3 (R. 31–43; 167–171). At this time Roberts asked whether petitioner had checked on the morphine. Petitioner answered that he would have some in the next two or three days and again quoted the price. Roberts said that he would check back with petitioner (R. 44, 171).

A few days later, petitioner told Roberts on the telephone (pursuant to Roberts' call) that he had checked with his "man", and that if he was going to handle the morphine tablets, it would be in a large quantity at one time. He quoted the price as $550 for 1,000 tablets and told Roberts he would probably have them on the following day (R. 45).

Roberts failed to call petitioner on the following day. When he called later, petitioner chided him for not calling as he had promised. Petitioner said that he had sold the morphine to another customer. Roberts said his man in San Antonio wanted a sample and petitioner promised that he would obtain a sample of ten or twelve tablets for Roberts. When Roberts called on November 23, petitioner indicated that he had the narcotics. Thereupon Roberts called the Federal Bureau of Narcotics and arranged to have a narcotic agent accompany him on a trip to petitioner's Tulsa home (R. 45–47).

On November 24, Inspector Roberts and Federal Narcotic Agent Rose drove to Tulsa where Roberts

introduced Rose to petitioner as his "boy" from San Antonio who handled "hard stuff" (R. 47, 191). Petitioner, after again chiding Roberts for not calling after placing an order, produced a bottle of 100 morphine sulfate tablets from which he said he would sell ten or twelve as a sample. Rose indicated that he would prefer to take the entire bottle in view of the distance he had traveled. After making a telephone call, petitioner sold the bottle to Rose for $100 (R. 48–49; 193–194). This was the basis for Count 5. In addition, the agents, at petitioner's urging, bought non-narcotic drugs (R. 52–53; 199).

At this meeting, petitioner talked about the danger of dealing in narcotic drugs and his preference for dealing in "pills". He said, however, that he had sold "many a bottle [narcotic drugs] for $200.00" (R. 194–195). He said that he knew addicts who would pay $5.00 a tablet—no questions asked—but that he did not deal with addicts or street peddlers. He said he was strictly a wholesale dealer whose supply was obtained through the manipulation of records of legitimate sources (R. 49; 192–193; 197).

In late November and early December, petitioner, in the presence of the agents, tried unsuccessfully to obtain a larger quantity of morphine (see R. 53–57; 201–204). He told the agents that he was having a difficult time, but that he knew of a burglar under guard at a hospital whose hidden cache of drugs could be obtained through the man's wife (R. 202). On December 4, petitioner indicated that he had been successful in locating the cache, and that it contained,

among other items, opium, morphine, and codeine (R. 206). Agent Rose drove to Tulsa and purchased from petitioner a quantity of drugs including the 139 codeine tablets which were the subjects of Counts 6 and 7 (R. 206–216).

Petitioner produced the testimony of a friend who said that in November 1964 he overheard petitioner tell agents Roberts and Rose that he could not find narcotics and that, while he did not know narcotics when he saw it, there might be some in the proceeds of a burglary which he thought he could obtain for them if they wanted it (R. 277, 279, 282). The friend said that the agents also asked him to try to locate narcotics for them and pressed him to do so in subsequent meetings and long-distance telephone calls (R. 278–280). Petitioner's wife testified that the agents "kept after" her husband to procure "hard stuff" (R. 289). She said that petitioner made no profit from the narcotics which a person had left at the trailer for him to sell, and that he thought he was doing the agents a favor (R. 293).

2. At the close of the government's case, petitioner moved to dismiss the narcotics counts on grounds of misjoinder and all counts on the ground that he was "legally entrapped" (R. 272). The motions were overruled. At the close of the whole case, after having offered the testimony referred to above, he unsuccessfully moved to dismiss the narcotics counts on the ground that the evidence showed entrapment as a

matter of law (R. 295). The judge gave a charge on entrapment as follows (R. 301–302):

> The accused offers the defense of unlawful entrapment as to the crime charged in the indictment.
>
> The law recognizes two kinds of entrapment; unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law, as a matter of policy, forbids a conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government Agents provide what appears to be a favorable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government Agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.
>
> If, then, the Jury should find that beyond a reasonable doubt from the evidence in the case, that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes, such as charged in the indictment, whenever opportunity was offered, and that the Government Agents did no more than offer the opportunity, the accused is not entitled to the defense of unlawful entrapment.
>
> On the other hand, if the Jury should find from the evidence in the case that the accused

> had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government then the defense of unlawful entrapment is a good defense, and the Jury should acquit the accused.

He also instructed the jury that each count of the indictment charged a separate offense and that the jury should consider the evidence applicable to each count separately. The judge said R. 303):

> * * * The fact that you may find the defendant guilty or not guilty of one of the crimes or offenses charged should not control your verdict with reference to any of the other crimes or offenses charged.

ARGUMENT

1. Petitioner concedes that the evidence clearly established that he was "ready and willing" to sell non-narcotic habit-forming drugs without a prescription (Pet. 18). He argues, however, that the evidence established entrapment as a matter of law with respect to the sale of the narcotic drugs. The test of entrapment, however, is whether the criminal design originated with government officials who implanted in the mind of an innocent person a disposition to commit the offense or whether such agents merely afforded the opportunity for the commission of the offense. See *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369; *Lopez* v. *United States,* 373 U.S. 427; *Osborn* v. *United States,* No. 29, this Term, decided December 12, 1966.

Here it was only after petitioner boasted that his "sources" could supply "anything" that the agents mentioned narcotic drugs. Petitioner immediately expressed willingness to ascertain whether such drugs were available, stating that he had previously made a sale to an addict and that his source of supply did not approve. The government's evidence revealed no hesitancy on his part thereafter in his attempts to supply morphine for resale to individuals who masqueraded as drug peddlers. His occasional cautionary remarks did not show lack of predisposition. And the fact that he was willing to violate the law with respect to the sale of non-narcotic drugs was, at least, some evidence of predisposition to sell narcotic drugs as well.

These circumstances do not establish entrapment as a matter of law. See *Masciale* v. *United States*, 356 U.S. 386, where the defendant had not been shown to have previously engaged in the narcotics business but embraced the opportunity to do so as soon as it was presented to him. In this case, not only did petitioner indicate that he could supply "anything", but he immediately set about trying to locate a supply when narcotics were mentioned. The issue of entrapment was, therefore, properly presented to the jury.

2. The instructions on entrapment were not made erroneous by the reference to "lawful" and "unlawful" entrapment. As petitioner notes (Pet. 14–16), the instruction given here has been approved in various manuals, but was criticized by the Court of Appeals for the Second Circuit in *United States* v. *Pugliese*,

346 F. 2d 861 (C.A. 2). We believe, however, that the instruction adequately conveyed to the jury the factual determination on which the entrapment defense rested. It distinguished, in plain and understandable terms, between "the trap for the unwary innocent and the trap for the unwary criminal" (see *Sherman* v. *United States*, 356 U.S. 369, 372). The reference to "lawful entrapment" did not invalidate the instruction. See *United States* v. *Laverick*, 348 F. 2d 708 (C.A. 3), certiorari denied, 382 U.S. 940; *Cross* v. *United States*, 347 F. 2d 327 (C.A. 8).

Nor is there any substance to petitioner's claim that the instructions *required* the jury to reject the entrapment defense as to the narcotics charges if it found that petitioner had a predisposition to sell non-narcotic drugs (Pet. 17–21). Petitioner's readiness to sell other habit-forming drugs in violation of federal law was, of course, *some* evidence of his readiness to sell narcotics. The instructions to the jury did no more, we submit, than permit the jury to consider that evidence in determining whether petitioner was entrapped; they did not require a rejection of the defense if the jury was satisfied that non-narcotic drugs had been sold. Petitioner reads that portion of the instruction which advised the jury that he was not entitled to the defense of entrapment if he "was ready and willing to commit crimes, such as charged in the indictment * * *" (p. 7, *supra*) as meaning that a disposition to commit *any* of the crimes enumerated in the indictment would require rejection of the entrapment claim as to *all* counts.

A full reading of the charge, and particularly of the instruction to consider each count separately, demonstrates that the jury could not have been confused in this manner. It was clear to the jury that the entrapment defense could be rejected on the grounds of predisposition as to any count only if there was adequate proof that petitioner was "ready and willing to commit" the offense charged in *that* count. In any event, the particular ambiguity now being pressed by petitioner was not specified to the district judge; the mere fact that petitioner offered an alternate instruction, which was defective for other reasons,[1] did not preserve the narrow and hardly obvious ambiguity as a ground for appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] Petitioner's instruction would have required a judgment of acquittal on entrapment grounds if the jury was satisfied that a federal agent was the first to mention the possible purchase of narcotic drugs. That is not the law. See *Masciale v. United States*, 356 U.S. 386.

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